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Supreme Court of the United States

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

PAGE BOOKS, INC., d/b/a BACHELOR'S LIBRARY ADULT BOOKSTORE,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court's opinion undermines the authority of *Miller v. California* by finding that the failure to give special interrogatory verdict forms in an obscenity case created a prior restraint by failing to instruct the respondent bookstore as to what materials it could offer in the future.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION OF THE COURT	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
THE ILLINOIS APPELLATE COURT'S OPINION MISCONSTRUES WHAT CONSTITUTES A PRIOR RESTRAINT AND UNDERMINES THE AUTHORITY OF *MILLER v. CALIFORNIA*. THIS COURT SHOULD RESOLVE THE CONSTITUTIONAL ISSUES RAISED IN THIS CASE BECAUSE THE ILLINOIS SUPREME COURT HAS EXPLICITLY STATED THAT IT IS UNABLE TO DO SO, AND BECAUSE THE APPELLATE COURT'S INTERPRETATION IS AT ODDS WITH THAT OF A SISTER STATE .	5
CONCLUSION	10
APPENDIX	App. 1

TABLE OF AUTHORITIES

CASES:	PAGE
Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 (1973)	9
Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)	7
Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973)	5, 8, 9
People v. Bailey, 125 Ill.App.3d 346, 465 N.E.2d 979, 80 Ill.Dec. 633 (2nd Dist. 1984)	9
People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267, 87 Ill.Dec. 910 (1985)	7
People v. McMullen, 400 Ill. 253, 79 N.E.2d 470 (1948)	6
People v. Page Books, Inc., 235 Ill.App.3d 765, 601 N.E.2d 273, 175 Ill.Dec. 876 (2nd Dist. 1992)	5-7
People v. Page Books, Inc., ____ Ill.2d ____, 631 N.E.2d 233, 197 Ill.Dec. 230 (1994)	10
People v. Sequoia Books, Inc., 160 Ill.App.3d 315, 513 N.E.2d 468, 112 Ill.Dec. 54 (2nd Dist. 1987)	6
State v. McNamara, 23 Or.App. 475, 543 P.2d 14 (1975)	8
State v. McNamara, 274 Or. 565, 547 P.2d 598 (1976)	8

CONSTITUTION:

United States Constitution
Amendment I ..... *passim*

United States Constitution
Amendment XIV 2

OTHER AUTHORITIES:

*Ill.Rev.Stat.*1989, ch. 38, par. 11-20(b) 8

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PEOPLE OF THE STATE OF ILLINOIS,
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Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Appellate Court of Illinois.

OPINIONS BELOW

The Illinois Appellate Court—Second District, issued its opinion reversing the respondent's obscenity conviction and remanding for a new trial on September 25, 1992, which is reported at 235 Ill.App.3d 765, 601 N.E.2d 273, 175 Ill.Dec. 876. After granting leave to appeal and hearing oral argument, the Illinois Supreme Court dismissed the appeal on April 13, 1994. That decision is reported at ___ Ill.2d ___, 631 N.E.2d 233, 197 Ill.Dec. 230 (1994).

JURISDICTION OF THE COURT

The opinion of the Illinois Appellate Court reversing the respondent's conviction was filed on September 25, 1992. The People of the State of Illinois timely filed their Petition for Leave to Appeal in the Illinois Supreme Court which, after hearing argument, was unable to reach a consensus and dismissed the People's appeal on April 13, 1994. This Petition is filed within 90 days of that order.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), since in the proceedings in the state courts of Illinois the respondent has asserted an alleged violation of its rights arising under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 14, 1989, an investigator for the DuPage County State's Attorney's Office presented a complaint for search warrant [illegible] the respondent's premises. The complaint sought the authority to search the Bachelor's Library Adult Bookstore in Lombard, Illinois, and to seize magazines and video cassette tapes containing depictions of certain sexual activity. A warrant was issued and a search was conducted on November 15, 1989 by DuPage County Sheriff's Department personnel. During the course of this search the premises were secured and 26 magazines (two of which were the same title) and five video tapes were seized under the authority of the search warrant. (C. 575, 578). On December 8, 1989, a two count complaint was filed against the respondent alleging the commission of the offense of obscenity. One count was based on a group of 25 magazines and a second count was based on a group of three videos. (C. 2). The tapes and magazines were introduced as evidence at the trial.

After the proofs were closed, the State tendered general verdict forms as to each count, which were given over the respondent's objection. The respondent requested and tendered, but the trial court refused, special verdict forms which would have required the jury to indicate individually which magazine and video tape was or was not obscene. (C. 934-935).

On January 11, 1991, the jury returned a general verdict of guilty as to each count. The respondent's post-trial motion for a new trial was denied. On February 20, 1991, the respondent was ordered to pay a fine of $1,000 plus $306 costs on each count for a total of $2,612. Notice of Appeal was timely filed. (C. 172-173).

The Appellate Court held that it was error to base the respondent's conviction for obscenity on a general verdict form which did not show which books or videos were the basis for the jury's verdict. The Court stated that this created an impermissible prior restraint under the First Amendment of the United States Constitution.

The Illinois Appellate Court accordingly reversed the respondent's conviction and ordered the cause remanded for a new trial. That court denied the People's request for rehearing, but ordered the deletion of its earlier citations to a particular case. The People sought and obtained review from the Illinois Supreme Court.

The Illinois Supreme Court heard oral argument on May 19, 1993. However, in a per curiam decision entered on April 13, 1994, that court dismissed the appeal because one Justice of the court recused himself and the remaining Justices were unable to reach a constitutionally required concurrence of four judges for a decision. That decision is reported at ____ Ill.2d ____, 631 N.E.2d 233, 197 Ill.Dec. 230 (1994).

The federal question at issue was first presented at the trial stage of the proceedings by the respondent's submission of special interrogatory verdict forms, which were premised on respondent's claim that they were necessary to avoid a prior restraint under the First Amendment. The trial court rejected respondent's proposed verdict forms. This was also the primary focus of the Appellate Court's opinion, which held, based on the First Amendment, that the trial court erred in rejecting respondent's verdict forms.

REASONS FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT'S OPINION MISCONSTRUES WHAT CONSTITUTES A PRIOR RESTRAINT AND UNDERMINES THE AUTHORITY OF *MILLER v. CALIFORNIA*. THIS COURT SHOULD RESOLVE THE CONSTITUTIONAL ISSUES RAISED IN THIS CASE BECAUSE THE ILLINOIS SUPREME COURT HAS EXPLICITLY STATED THAT IT IS UNABLE TO DO SO, AND BECAUSE THE APPELLATE COURT'S INTERPRETATION IS AT ODDS WITH THAT OF A SISTER STATE.

The opinion of the Illinois Appellate Court—Second District should be reviewed by this Court because it seriously misinterprets the First Amendment. It does this in two ways—by broadening the definition of a prior restraint to include future acts of the respondent itself and by drawing into question the reliability of this Court's holding in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973), which defined what is obscene, as a guide to what conduct will be deemed illegal.

In the case below the respondent was charged with two counts of obscenity. One count was based on a group of 25 magazines and a second count was based on a group of three videos. Over the respondent's objection, the jury was given general verdict forms for guilty and not guilty for each count. The respondent tendered special verdict forms that would have required the jury to record a finding of obscenity as to each magazine and video. These were refused.

The Appellate Court found that the joining of multiple communicative items in a single count with a general verdict of guilty constitutes an unconstitutional procedure which "has essentially similar constitutional ramifications" as a classic prior restraint. *People v. Page Books, Inc.*, 235 Ill.App.3d 765, 772, 601 N.E.2d 273, 277, 175 Ill.Dec.

876, 880 (2nd Dist. 1992). In coming to this conclusion, the Appellate Court accepted the respondent's argument that a prior restraint (or quasi-prior restraint) was created because the respondent cannot know from the general verdict which of the communicative items were found to be obscene and this will therefore impinge on its actions *in the future* as to what books the respondent may offer.

At this point it is to be understood that, in Illinois, the general rule is that closely connected acts, any one of which could form the basis of conviction, may be joined in one count. *People v. McMullen*, 400 Ill. 253, 79 N.E.2d 470 (1948); *People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 513 N.E.2d 468, 112 Ill.Dec. 54 (2nd Dist. 1987). It is thus apparent that the Illinois Appellate Court has created a special rule in this regard in order to accommodate what it believes the First Amendment requires.

Petitioner submits that the illogic of the Appellate Court's opinion is manifest. The special interrogatory verdict forms mandated by the Appellate Court have no direct bearing on the outcome of the trial in which their use is required. The primary reason stated by the Appellate Court for holding that a prior restraint is created by the use of a general verdict form is essentially that the respondent is deprived of the educational value of the verdict in that it does not know if one, some or all of the items forming the basis of the charge were found obscene by the jury and the respondent is thus compelled to curtail dissemination of all the charged items, for fear of a future prosecution.

However, it is utterly clear that a prior verdict is unsuited to the role given it by the Appellate Court. A finding of obscenity in a particular case cannot be said to reliably predict the findings of a future jury on the same

evidence. As indicated by the Appellate Court itself, prior jury verdicts, even as to particularly identified material, would be irrelevant in a subsequent trial. *Page Books, Inc., supra*, 235 Ill.App.3d at 777-778, 601 N.E.2d at 281. The Appellate Court correctly noted that a not guilty verdict in a prior case would not be a reliable predictor as to whether a subsequent jury would find the same material obscene. Lack of scienter, for example, is unrelated to the actual obscenity of a magazine or video.

Also, one must further question the utility of a notice procedure which gives notice only as to such books as the State happens to select as the basis of its prosecution. The respondent receives no notice as to the obscenity of other items offered for distribution by the respondent at the same time.

The Appellate Court also noted the difficulty a court might face if asked to "rummage" through a "potentially unlimited supply of suspect materials" in deciding if the respondent was proved guilty beyond a reasonable doubt. *Page Books, Inc., supra*, 235 Ill.App.3d at 772, 601 N.E.2d at 277. However, this concern is nonexistent, unless one believes that the First Amendment mandates an exception to the general rule that, when a defendant on review challenges the sufficiency of the evidence on which he is convicted, the reviewing court is not required to ask itself whether it believes the evidence at trial established guilt beyond a reasonable doubt. Rather, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *People v. Collins*, 106 Ill.2d 237, 478 N.E.2d 267, 87 Ill. Dec. 910 (1985).

As a further reason to grant the writ, a reason that is related to the above point, the Appellate Court originally relied on similar reasoning contained in *State v. McNamara*, 23 Or.App. 475, 543 P.2d 14 (1975). When the People pointed out that this case had been overruled in *State v. McNamara*, 274 Or. 565, 547 P.2d 598 (1976), the Appellate Court ordered the references to the Oregon appellate decision stricken.[1] However, the fact remains that Illinois and Oregon now have different interpretations of the First Amendment on this point. This is an additional reason for this Court to consider this case.

The People's last point is that the Appellate Court's opinion undermines the authority of this Court's opinion in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). This is so because the Illinois obscenity statute incorporates the three-part *Miller* test in the definition of what is obscene:

> (b) Obscene Defined.
>
> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

*Ill.Rev.Stat.*1989, ch. 38, par. 11-20(b).

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[1] The opinion in the appendix to this petition is the only version which was issued by the Appellate Court, and therefore contains the citations in question. The reported decision does not contain such citations.

Petitioner argued below that the proper source of notice as to what does or does not constitute a criminal offense is the statute itself (and thus, by extension, *Miller*). Prior to the instant case, this was the position of Illinois law. In *People v. Bailey*, 125 Ill.App.3d 346, 465 N.E.2d 979, 80 Ill.Dec. 633 (2nd Dist. 1984), the court stated that it is the obscenity statute itself which must advise the defendant of the meaning of obscenity and thereby forewarn him, in advance of his actions, whether his contemplated conduct is proscribed.

The Appellate Court's holding also appears to conflict with the holding of this Court in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973). In *Heller*, this Court stated that there is no First or Fourteenth Amendment right to a prior adversary hearing applicable to cases where allegedly obscene material is seized. The Appellate Court's holding appears to contradict *Heller* since the special interrogatories mandated by the instant case are adversary determinations made in advance of any state action to which the information obtained by the interrogatories would be relevant.

In summary, certiorari should be granted for several reasons. First, the Appellate Court's opinion baselessly broadens the scope of the definition of a prior restraint to include future acts of the respondent itself and future acts of the prosecution which are only hypothetical. Second, the Appellate Court's holding is not in accord with *Miller v. California*, *supra*, as it is incorporated in the Illinois obscenity statute, because the Appellate Court refuses to find that the statute itself gives adequate notice as to what is obscene. Third, the Appellate Court's opinion is in direct disagreement with that of the Oregon Supreme Court. Fourth, the Illinois Supreme Court explicitly stated that it was unable to decide the issue

presented herein. *People v. Page Books, Inc.*, ____ Ill.2d ____, 631 N.E.2d 233, 197 Ill.Dec. 230 (1994). There is no other forum in which this issue could be decided.

CONCLUSION

For the foregoing reasons, petitioner requests that a Writ of Certiorari be issued to review the decision of the Appellate Court—Second District of the State of Illinois and, upon review, to reverse that court's decision in this case.

Respectfully submitted,

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APPENDIX

App. 1

[Filed September 25, 1992]

No. 2-91-0243

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

PAGE BOOKS, INC., d/b/a Bachelor's Library Adult Bookstore,

Defendant-Appellant.

Appeal from the Circuit Court of DuPage County.
No. 89-CM-6929
Honorable Donald J. Hennessy, Judge Presiding.

Justice DOYLE delivered the opinion of the court:

Defendant, Page Books, Inc., was charged by verified complaint in the circuit court of Du Page County with two counts of obscenity (Ill.Rev.Stat.1989, ch. 38, par. 11-20(a)(1)). Following a jury trial, defendant was found guilty of both counts and sentenced to a fine of $1,000 plus costs on each count.

Defendant raises the following issues on appeal: (1) whether the use of an IPI instruction referring to children in the context of community standards constituted prejudicial error; (2) whether the exclusion of certain community standards evidence violated due process; (3) whether the inclusion of multiple communicative items in a single

count combined with a general verdict form created an impermissible prior restraint; and (4) whether the complaint failed to properly charge an offense because it did not allege that the various materials were obscene.

The following facts are relevant to the issues raised on appeal. On November 15, 1989, pursuant to a warrant, authorities searched a bookstore owned and operated by defendant. A total of 26 magazines and five videotapes were seized during the search. Twenty-five of the magazines and three of the videos were introduced as evidence at defendant's trial along with three magazines purchased by an investigator prior to the issuance of the search warrant.

Dr. Joseph Scott, a professor in the sociology department at Ohio State University, testified on behalf of defendant. Dr. Scott was hired by defendant to conduct a survey of 500 adults in Illinois concerning their views of and attitudes on sexually explicit materials. The 500 adults questioned were a representative cross-section of Illinois. The survey was prepared, conducted and evaluated in accordance with state-of-the-art procedures.

The survey consisted of numerous background and general information questions. Additionally, there were seven questions that addressed contemporary community standards concerning explicit sexual material. The persons surveyed were told prior to answering the seven questions that "[t]he next few questions deal with adult x-rated videos and sexually explicit magazines. These videos and magazines may have little or no plot. Their contents are primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities including: vaginal intercourse, ejaculation, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex and variations

of these by adult performers. No minors are involved, and these materials can only be purchased, rented or viewed by adults who desire them."

Question number 16 asked whether the "portrayal of such sexual conduct, in adult videos and magazines, available only to adults, has become *more* or *less* acceptable in recent years in Illinois?" (Emphasis in original.) Question number 20 inquired whether it is "acceptable or not in Illinois for these neighborhood video stores to rent or sell such X-rated videos to adults?" (Emphasis in original.) The State objected to questions 16 and 20 and the responses thereto. The court ruled that questions 16 and 20 were inadmissible, and it barred Dr. Scott from testifying about either question. Dr. Scott did testify that based on the survey results generally at least 50% of every subcategory of people surveyed found such sexually explicit materials to be acceptable or tolerated.

The State filed a motion *in limine* seeking to bar evidence "relating to the availability of 'x-rated' or 'adult' video tapes in certain, yet undisclosed video stores * * * for the purpose of establishing 'acceptability' within the contemporary adult community." The trial court granted the motion and barred any evidence pertaining to a survey conducted by Larry Adelsberger of various "adult bookstores" and "family video stores." The parties stipulated as an offer of proof that if called to testify Adelsberger would testify to the information contained in a written report prepared by him. The report states that Adelsberger visited 14 adult book stores and 14 family video stores throughout Illinois in August 1990. Regarding the adult bookstores, he made observations concerning the outside of the stores, the customers, the printed materials, video tapes and marital aids. He also purchased printed materials and videos from various stores that he

considered representative of the materials offered for sale. As to the family video stores, he observed the adult video section and interviewed employees of the various stores concerning the inventory of adult videos and the frequency of their rental. Adelsberger would also testify as to various magazines he purchased from other bookstores in Illinois as representative of what type of sexual magazines are available. Defendant offered the report and Adelsberger's testimony as evidence of the degree of acceptability of this type of material in Illinois.

The trial court also barred admission of the information, docket sheet and signed verdict forms in an obscenity prosecution in the circuit court of Champaign County. The jury returned a verdict of not guilty in that case in October 1990.

The jury received the following instruction, among others, in this case:

> "To sustain the charge of obscenity, the State must prove the following propositions:
>
> First that the defendant offered or agreed to sell or provide an obscene magazine; and
>
> Second that the defendant then knew the nature or content of the magazine or recklessly failed to exercise reasonable inspection which would have disclosed the nature or content of the magazine.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The State also tendered Illinois Pattern Jury Instructions, Criminal, No. 9.57 (2d ed.Supp. 1989) (hereinafter IPI Criminal 2d No. 9.57 (Supp. 1989)), which reads in pertinent part:

> "Obscenity is judged with reference to the standards of adults, except that it is judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

Defendant objected to this portion of the instruction and argued that the reference to children should be deleted as there was no evidence that the materials at issue involved children or were directed to children. Defendant offered a modified version of IPI Criminal 2d No. 9.57 (Supp. 1989) wherein it deleted the reference to children and added language referring to homosexuals as a specially susceptible audience.

The court, over defendant's objection, gave general verdict forms of guilty and not guilty on each count as to the magazines and the videos. Defendant tendered special verdict forms that would have required the jury to record a finding of obscenity as to each magazine and each video. The court overruled the objection to the general verdict forms and refused to submit the special verdict forms to the jury.

The jury returned a verdict of guilty on the count pertaining to the magazines and a guilty verdict on the video count. Following the denial of its post-trial motion, defendant filed this timely appeal.

We first consider defendant's prior restraint argument as that issue is dispositive of this appeal. Defendant contends that the clustering of the three videos into one

count and the 25 magazines into a second count, combined with the submission of general verdict forms as to each count, created an impermissible prior restraint. Specifically, defendant argues that the jury could have returned guilty verdicts based upon its finding that only one of the items listed in each count was obscene and that it is impossible to discern which magazines or videos were found to be obscene. Thus, defendant is compelled to curtail its continued dissemination of all of the magazines and videos, or other similar items, for fear that those materials may have been determined to be obscene by the jury.

A prior restraint occurs when, without any judicial determination, a communication is characterized as obscene and suffers a detriment to its further communication. (*People v. Hall* (1986), 143 Ill.App.3d 766, 778, citing *Southeastern Promotions, Ltd. v. Conrad* (1975), 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239.) Under the fourteenth amendment, a State is not free to adopt whatever procedures it pleases for addressing obscenity without regard to the possible consequences for constitutionally protected speech. (*Marcus v. Search Warrant of Property* (1961), 367 U.S. 717, 731, 6 L.Ed.2d 1127, 1136, 81 S.Ct. 1708, 1716.) The regulation of obscenity must conform to procedures that ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line. (*Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58, 66, 9 L.Ed.2d 584, 590, 83 S.Ct. 631, 637.) Moreover, because only considerations of the greatest urgency can justify restrictions on speech, and because the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts are adjudicated are of special importance, and the validity of the restraint may turn on the safeguards which they afford. (*Speiser*

v. Randall (1958), 357 U.S. 513, 521, 2 L.Ed.2d 1460, 1469-70, 78 S.Ct. 1332, 1339.) Only a judicial determination in an adversary proceeding ensures the sensitivity to freedom of expression sufficient to impose a valid final restraint. *Freedman v. Maryland* (1965), 380 U.S. 51, 58, 13 L.Ed.2d 649, 654, 85 S.Ct. 734, 739.

This case differs from the typical prior restraint scenario in that defendant was afforded a full-scale trial by jury on the charges that the various magazines and videos were obscene. Nevertheless, we believe the procedures employed here resulted in an improper final restraint on defendant's first amendment rights. The State elected to charge all 25 magazines in a single count. The jury, in turn, was instructed that if it found "a magazine" to be obscene it could find defendant guilty. The court also submitted a general verdict form which limited the jury to either finding defendant guilty or not guilty. The jury was not required to make an individualized determination concerning the obscenity of each magazine. Because the jury returned a general verdict of guilty, we cannot determine, nor can defendant, which of the 25 magazines were in fact obscene. It is possible that one or more of the magazines were determined to be obscene or that all of them were found obscene. It is this ultimate uncertainty which renders the procedures followed here constitutionally defective.

The State seized and detained defendant's publications and subjected them to judicial scrutiny. Yet, the seizure was not followed by any decisive determination of obscenity as to any individual magazine or video. While such a process may not constitute a prior restraint in the classic sense of that term, it has essentially similar constitutional ramifications. Defendant is left to speculate as to which magazines were obscene and is therefore without a con-

crete determination of obscenity. An obvious potential exists that the scatter gun impact of such a general verdict might unjustifiably operate to publicly taint constitutionally protected materials which were not the actual object of the jury's finding.

Parenthetically we note that the constitutional deficiencies inherent in the charging procedure in question here might become even more troublesome in those cases in which the sufficiency of the evidence of obscenity is challenged on appeal. It is not the function of a reviewing court to rummage through a potentially unlimited supply of suspect materials in search of an unidentified item or items which might be sufficient to sustain a general verdict of guilty. There can be no certainty that such a process would necessarily disclose the same item(s) which led to the jury's determination. Although a reviewing court can reverse a conviction by concluding that allegedly obscene materials are not obscene, it cannot declare materials obscene where the jury found otherwise. Only the trier of fact may render the initial determination, and that determination must be sufficiently particularized to enable subsequent review. (See *Oregon v. McNamara* (1975), 23 Or. App. 475, 543 P.2d 14.) The charging of multiple magazines in one count, instructing the jury that a guilty verdict should be returned if any magazine is obscene and the giving of a general verdict form combined to render the verdict in this case imprecise. Such imprecision cannot be tolerated when freedom of expression is at issue. See *Oregon v. McNamara* (1975), 23 Or. App. 475, 543 P.2d 14.

This opinion is significantly based upon considerations uniquely applicable to the protection of freedom of expression. Although we have concluded that this particular charging procedure, when utilized in conjunction with gen-

eral verdict forms, is inadequate to separate protected from unprotected expression, our opinion should not be misconstrued as criticizing the practice of joining closely related acts in a single count of the charging instrument in other types of prosecutions. Considering the options available to the State to modify its approach to accommodate the constitutional concerns expressed herein, it seems unlikely that this requirement will create any significant impediment to the effective prosecution of obscenity offenses.

Because defendant failed to receive a precise judicial determination as to the obscenity of the various magazines and videos on trial, it was denied the full protections of due process provided by the fourteenth amendment. As such, we are compelled to reverse defendant's conviction and remand for a new trial. In doing so, we will consider the remaining issues raised in defendant's appeal as they are likely to recur on remand.

The first of the remaining issues is whether the use of IPI Criminal 2d No. 9.57 (Supp. 1989), which referred to children, constituted prejudicial error.

Defendant contends that it was error in this case to include a reference to children in the instruction on community standards because to do so allowed the jury to consider children as part of the relevant community. IPI Criminal 2d No. 9.57 (Supp. 1989) defines obscenity and states:

> "Any [(material) (performance)] is obscene if
>
> [1] the average person, applying contemporary adult community standards, would find that the work, taken as a whole, appeals to the prurient interest; and
>
> [2] the average person, applying contemporary adult community standards, would find that it depicts or

describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and

[3] a reasonable person, taking the [(material) (performance)] as a whole, would find no serious literary, artistic, political or scientific value.

[Obscenity is judged with reference to the standards of adults, except that it is judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.]

In determining how any [(material) (performance)] would be viewed by the average person, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State." IPI Criminal 2d No. 9.57 (Supp. 1989).

Our obscenity statute specifically sets forth when children can be considered part of the community. (*People v. Hall* (1986), 143 Ill.App.3d 766, 780.) Section 11-20(c) states that "[o]bscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

(Ill.Rev.Stat.1989, ch. 38, par. 11-20(c).) Clearly, IPI Criminal 2d No. 9.57 (Supp. 1989) reflects the adult community standard and its children or susceptible audience exception as set forth in section 11-20(c).

It is evident that the portion of IPI Criminal 2d No. 9.57 (Supp. 1989) concerning children and specially suscep-

tible audiences was intended to be an optional part of the instruction as it is contained in brackets.

Furthermore, the committee notes to IPI Criminal 2d No. 9.57 instruct to "[u]se applicable bracketed material." (IPI Criminal 2d No. 9.57, Committee Notes (Supp. 1989).) This further suggests that the bracketed material is optional. The fact that the bracketed material is optional indicates that it was not intended to be used in every instance in which a jury is instructed on the definition of obscenity.

In the present case, defendant objected to the bracketed portion of the instruction and argued that the reference to children should be deleted because there was no evidence that the materials at issue were directed toward children.

We conclude that it was error for the trial court to have given the challenged portion of the instruction over objection without first making a finding that some evidence existed from which the jury might find that the material was specially designed for or directed to an audience of children. Any contrary holding would be tantamount to an approval of the optional instruction in all obscenity cases without reference to the evidence.

Defendant next contends that the exclusion of certain community standards evidence was a violation of due process. First, defendant argues that the trial court erred in ruling that two questions and their responses from Dr. Scott's survey were inadmissible as evidence of community standards. The first question asked whether, in the interviewee's opinion, the portrayal of sexual conduct in adult videos and magazines had become more or less acceptable in Illinois in recent years. The second question inquired as to the acceptability of "neighborhood video stores" making x-rated videos available to adults.

Our research reveals one case addressing the admissibility of community standards survey results in an obscenity prosecution. In *People v. Nelson* (1980), 88 Ill.App.3d 196, this court held that it was error for the trial court to have excluded a survey of a sample of the adult population regarding the acceptability of depictions of sexually explicit materials. (*Nelson*, 88 Ill.App.3d at 197-200.) In so holding, we relied in part on section 11-20(c)(4) of the Criminal Code of 1961 (Ill.Rev.Stat.1977, ch. 38, par. 11-20(c)(4)), which provided that evidence showing the degree of public acceptance of sexually explicit material was admissible. (*Nelson*, 88 Ill.App.3d at 198.) We further determined the survey questions and answers to be relevant because they showed that a majority of Illinois residents found depictions of nudity and actual or pretended sexual activities acceptable. (*Nelson*, 88 Ill.App.3d at 198.) Such questions and answers are relevant to the questions of whether materials are patently offensive and whether such material appeals to prurient interest. (*Nelson*, 88 Ill.App.3d at 198.) Lastly, we concluded that survey evidence may be the only way to prove degrees of acceptability of sexually explicit material as compared to its availability. *Nelson*, 88 Ill.App.3d at 199.

While we held in *Nelson* that surveys regarding the acceptability of sexually explicit materials cannot be ruled inadmissible *per se*, we did not hold them to be admissible in all cases or *in toto*. In the present case, the trial court admitted all but two questions from the proffered survey. Question 16 of the survey asked, "In your opinion, has the portrayal of such sexual conduct, in adult videos and magazines, available only to adults, become *more* or *less* acceptable in recent years in Illinois?" (Emphasis in original.) Such a question, while arguably showing a trend in acceptability of sexually explicit materials,

does not establish whether particular materials are presently acceptable. For instance, certain sexually explicit materials may be more acceptable today than a few years ago but may still remain unacceptable by a majority of the adult population. The issue in an obscenity prosecution is present day acceptance, not whether materials are more acceptable than they once were. Thus, the trial court properly excluded question 16.

Question 20 stated that "[m]any neighborhood video stores in Illinois have x-rated videos as described" and asked whether it is or is not acceptable "in Illinois for these neighborhood video stores to rent or sell such x-rated videos to adults requesting such material?" This question is clearly premised upon the assertion that many neighborhood video stores have sexually explicit videos. Such a premise is unproven, however. As such, it unfairly contaminates the results of question 20 in that it suggests that such videos are acceptable because they are marketed in *many neighborhood* stores. The use of the word "many" suggests widespread dissemination. The word "neighborhood" when contrasted with "adult video" or "adult bookstore" has a more familial connotation. Used in conjunction, and unsupported by any evidence, these words create a strong impression to the person responding to the survey that there is a degree of acceptability to the videos.

We also perceive an additional problem with admitting question 20 into evidence. Because it contains the unsupported assertion that many neighborhood video stores stock sexually explicit videos, there is a significant risk that the jury would conclude that many neighborhood stores do in fact carry such videos. This could have a direct impact on the jury's determination of acceptability of the materials at issue in the trial. Absent some evidentiary

basis to support such an assertion, the question was properly excluded. Accordingly, there was no clear abuse of discretion in excluding questions 16 and 20.

Furthermore, a trial court's ruling concerning the relevance and admissibility of evidence will not be reversed unless, if an abuse of discretion, it results in a manifest prejudice to the defendant. (*People v. Hayes* (1990), 139 Ill.2d 89, 130.) Even if the trial court erred in excluding questions 16 and 20, any error was harmless in light of the additional evidence presented from the survey relevant to the issue of community standards and acceptability. For example, the survey asked whether the portrayal of sexual conduct is acceptable in Illinois and whether it is acceptable that sexually explicit materials should be sold or rented to adults. Moreover, the degree of acceptability indicated by the admitted questions was comparable to or slightly greater than the excluded questions. Consequently, under these circumstances, it was not manifestly prejudicial error to have excluded questions 16 and 20 from the trial.

Second, defendant maintains that it was error to exclude testimony concerning Larry Adelsberger's visits to various adult bookstores and neighborhood video stores because such information constituted evidence of acceptability. Again, we will not reverse the trial court's ruling in this regard absent a clear abuse of discretion resulting in manifest prejudice to defendant. (See *Hayes*, 139 Ill.2d at 130.) In reviewing the discretionary ruling of the district court excluding admission of similar materials available on newsstands, the United States Supreme Court held that while a defendant in an obscenity prosecution is entitled to an opportunity to present relevant, competent evidence bearing on the issues at trial the mere availability of similar materials in the community does not automatically make

them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with disseminating. (*Hamling v. United States* (1974), 418 U.S. 87, 125, 41 L.Ed.2d 590, 625, 94 S.Ct. 2887, 2911-12.) The "mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *Hamling*, 418 U.S. at 126, 41 L.Ed.2d at 626, 94 S.Ct. at 2912.

The fact that other similar magazines and videos are available does not bear on the question of acceptability of those materials by the community. If that were the case, the dissemination of such materials could hardly be subject to prosecution as they would be necessarily acceptable by virtue of their availability. The fact that Adelsberger observed persons purchasing these magazines or renting videos does not substantially alter the result. Merely because certain individuals may choose to partake in the availability of sexually explicit materials does not establish the acceptability by the community of such materials. Again, the mere purchase of similar materials alone means nothing more than other persons are engaged in similar activities. Absent some concrete indication that the purchasers or renters of such materials represent a significant portion of the community, evidence of the acquisition of such materials does not bear on the question of acceptability. As such, the exclusion of Adelsberger's testimony and his survey was not a clear abuse of discretion.

Third, defendant maintains that the trial court erred in refusing to take judicial notice of certain portions of a prior obscenity prosecution in Champaign County wherein the defendant was found not guilty by jury verdict. Defendant argues that because 10 of the magazines charged in the Champaign County case have identical titles as 10 of

the magazines at issue here the not guilty verdict is strong evidence of acceptability of the magazines charged here.

Defendant cites no case directly addressing this issue, nor does our research reveal any. Defendant's contention must fail for several reasons. First, it would be improper to take judicial notice of the findings of the jury in the Champaign County case because the parties in that proceeding are not the same as in the present case. (See *People v. Free* (1986), 112 Ill.2d 154, 165-66.) Second, there is no evidence on this record that the magazines at issue in the Champaign County prosecution are the same as any of those in this case. While some of the titles are identical, there is no indication that they are in fact the same magazines or that they contain similar material. Third, we have no way of knowing the jury's basis in the Champaign County case for its not guilty verdicts. It may be that the jury found an element other than obscenity of the materials to be lacking in the evidence. At the very least, it cannot be conclusively said that the basis of the not guilty verdicts was the nonobscenity of the 10 magazines. Thus, even if we concluded that it would be proper to introduce the record from the Champaign County prosecution as submitted by defendant, it would do nothing more than confuse the issues before the jury rather than aid the jury in arriving at its verdict. For all of the foregoing reasons, we hold that the trial court's refusal to take judicial notice of the Champaign County record and admit it into evidence was not an abuse of discretion.

Finally, defendant contends that while none of the excluded items of evidence alone would be dispositive of the issue of community standards or the acceptability of the materials, the items are "strong evidence" of the degree of acceptability of such materials and comparable materials

in Illinois. Because we have already held that such evidence was properly excluded from the trial, we necessarily reject this argument. Whether certain evidence is potentially dispositive or merely "strong evidence" is of no consequence if the evidence is otherwise inadmissible.

We need not address defendant's final argument that the complaint was deficient for not including an allegation of obscenity as defendant has conceded in its reply brief that such deficiency did not render the complaint defective.

For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand this cause for a new trial.

Reversed and remanded.

BOWMAN and NICKELS, JJ., concur.

[*Letterhead Of*]

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Office of the Clerk
708/695-3750

Appellate Court Building
Elgin, Illinois
60120-5558

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 89CM6929

THE COURT HAS THIS DAY, 11/09/92, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-91-0243

People v. Page Books dba Bachelor's Library Adult

Motion by defendant-appellant, Page Books, Inc., to vacate remand order and the Petition for Rehearing. Motion and Petition for Rehearing is denied. The Opinion filed September 25, 1992, shall be modified by striking both references to Oregon v. McNamara (1975), 23 Or. App. 475, 543 P.2d 14, which appear on page 9 of the opinion.

LOREN J. STROTZ, Clerk

cc: Beckett, Crewell & Kelso
Roger B. Webber
J. Steven Beckett
Honorable James E. Ryan
William L. Browers, Deputy Director
Marshall M. Stevens
John Kinsella, Asst. State's Atty.

[*Letterhead Of*]

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 3, 1993

State's Attorneys Appellate Prosecutor
Second Judicial District
2032 Larkin Ave.
Elgin, IL 60123

No. 74743—People State of Illinois, petitioner, v. Page Books, Inc., etc., respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

Nickels, J., took no part.

We call your attention to Supreme Court Rule 315(g) concerning certain notices which must be filed.

No. 74743

IN THE SUPREME COURT
OF ILLINOIS

People State of Illinois,	)	
	)	
Appellant	)	
	)	Appeal
v.	)	Appellate Court
	)	Second District
Page Books, Inc., d/b/a	)	2-91-0243
Bachelor's Library Adult	)	89CM6929
Bookstore,	)	
	)	
Appellee	)	

ORDER

Per Curiam:

In this case, one Justice of this Court has recused himself, and the remaining members of the Court are divided so that it is not possible to secure the constitutionally required concurrence of four judges for a decision (Ill. Const. 1970, art. VI, sec. 3). Accordingly, the appeal is dismissed. See *Perlman v. First National Bank* (1975), 60 Ill. 2d 529.

Nickels, J., took no part.

[Filed April 13, 1994
SUPREME COURT OF ILLINOIS]